

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-2508

PETITION OF DONALD PAYNE

OPINION OF THE BOARD
(Public Hearing Date: May 15, 2002)
(Effective Date of Opinion: June 28, 2002)

Case No. S-2508 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment.

On May 15, 2002, the Board of Appeals held a hearing on the application pursuant to Section 59-A-4.11 of the Zoning Ordinance. Donald Payne testified in support of the application. Kevin M. Martell, Filed Supervisor, Montgomery County Department of Housing and Community Affairs, testified about his inspection of the accessory apartment. The Board received no testimony or correspondence in opposition to the application.

Decision of the Board: Special Exception **Granted**, subject
to conditions enumerated below.

EVIDENCE PRESENTED

1. Donald Payne seeks permission to operate an accessory apartment. The subject property is Lot 11, Block D, Fox Ridge Estates Subdivision, located at 14 Honeysuckle Court, Damascus, Maryland, in the RDT Zone.
2. The house was built in 1972. The Paynes purchased the house in the Spring of 1973, and constructed the accessory apartment between 2000 and 2002 [Exhibit No. 5(b)]. Mr. Payne stated that it is his intention to move into the accessory apartment and rent out the main portion of the house.

3. The accessory apartment is located in the basement of the house [Exhibit Nos. 5(b) and 15].
4. The lot comprises 43,105 square feet [Exhibit Nos. 5(b) and 15].
5. The apartment has a separate entrance at the rear of the home [Exhibit No.12].
6. There are at least three off-street parking spaces available in the driveway of the home [Exhibit Nos. 5(b) and 12, p. 6 and attached photo].
7. There are no other special exceptions for accessory apartments in the general neighborhood [Exhibit Nos. 12 and 15].
8. Maryland National Capital Park and Planning Commission staff recommends approval of the application. Staff finds the use consistent with the Damascus Master Plan, which supports the existing RDT Zone for the subject property. Accessory apartments are allowed by special exception in that zone. Staff finds that there is room for more than two off-street parking spaces, and that the 750 square-foot accessory apartment is subordinate to the 2,567 square-foot house [Exhibit No. 12].
9. Montgomery County Housing Field Supervisor Kevin Martell inspected the subject property on May 10, 2002. A report of his inspection notes two corrections required for the accessory apartment to be in compliance with Housing Code and Zoning Code requirements [Exhibit No. 13]. Mr. Martell's report also states that if the owner's reside in the accessory apartment, the main portion of the house must be rented to a family of related persons.
10. Mr. Payne stated that he will make the corrections noted in Mr. Martell's inspection report.

FINDINGS OF THE BOARD

STANDARD FOR EVALUATION

Section 59-G-1.2.1 sets forth the standard that the Board must use to evaluate a special exception. That standard requires that a special exception be evaluated based on its inherent and non-inherent adverse effects at the particular location proposed, irrespective of adverse effect if elsewhere established in the zone [Zoning Text Amendment 99004, Opinion, p. 4].

Section 59-G-1.2.1. Standard for evaluation:

A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of the adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.

The Board interprets this section to require the following analysis. The Board must:

(1) Make a determination as to the general neighborhood affected by the proposed use.

(2) Establish those generic physical and operational characteristics associated with a given use, in this case an accessory apartment, to create an evaluation standard. The evaluation standard does not include the actual physical size and scale of operations of the use proposed.

(3) Determine separately the physical and operational characteristics of the use proposed, in this case an existing accessory apartment.

(4) Compare the generic characteristics of the evaluation standard with the particular characteristics of the use proposed. Inherent adverse effects are those characteristics of the use proposed consistent with the generic characteristics of the evaluation standard. Non-inherent adverse effects are those characteristics found in the proposed use but not in the evaluation standard.

Applying the above analysis to this case, the Board finds as follows:

(1) *The General Neighborhood*

The Board finds that the general neighborhood for the proposed use is the Fox Ridge Estates Subdivision bordered to the north by Kemptown Road, to the south by Moxley Road, to the west by the county line and to the east by a Potomac Edison transmission line.

(2) *Evaluation Standard - Physical and Operational Characteristics*

The Board recognizes that MNCPPC technical staff has, in previous cases, offered seven criteria to establish the physical and operational characteristics of a use. These are size, scale, scope, lighting, noise, traffic, and environment. The Board finds that the typical characteristics of an accessory apartment include a separate entrance for the apartment, possibly in combination with a walkway and some lighting to access the entrance. Some additional activity, including traffic and parking, associated with the residents of the apartment is also typical. The number of occupants allowed by the Housing Code is based upon the square footage of the dwelling unit.

(3) *Proposed Use -Physical and Operational Characteristics*

The proposed accessory apartment measures 750 square feet. It has a separate entrance at the rear of the house. More than two off-street parking spaces are available in the existing driveway of the home, both in front of and behind the house. The house is well set back from neighboring properties and screened by mature trees and vegetation.

(4) *Comparison of Characteristics*

(a) *Inherent Adverse Effects*

After considering the generic characteristics of accessory apartments and comparing them with the physical and operational characteristics of the proposed use, the Board finds that all of the characteristics of the proposed use will be inherent ones.

(b) *Non-Inherent Adverse Effects*

The Board finds that there will be no non-inherent adverse effects of the requested accessory apartment.

59-G-1.21. General Conditions.

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Section 59-C-9.3 of the Zoning Ordinance permits accessory apartments in the RDT zone, by special exception.

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

59-G- As set forth below, the use will comply with the standards in Section 2.00.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The Damascus Master Plan supports the existing RDT zoning for the subject property, where accessory apartments are allowed by special exception.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

The Board finds that the accessory apartment will be in harmony with the general character of the neighborhood. No new structures are proposed. The entrance to the accessory apartment is at the back of the house, preserving the residential appearance of the home. More than two off-street parking spaces are available in the driveway.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the requested accessory apartment will not have a significant impact on surrounding properties. The house is well set back from other properties and screened by existing trees and vegetation [Exhibit No. 3 and photos attached to Exhibit No. 12].

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The requested accessory apartment will add none of these adverse effects to the home. The apartment will use the existing HVAC system of the house.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendation of a master or sector plan do not alter the nature of an area.*

There are no other special exceptions in the general neighborhood.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the proposed, 750 square-foot accessory apartment, is in harmony with the general character of the neighborhood, will have little impact on surrounding properties, and will have none of the above adverse effects.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer public roads, storm drainage and other public facilities.*

The Applicant states that the subject property is served by adequate public facilities. The Board will impose a condition of approval that the Applicant obtain certification of adequacy of the septic system from the Well and Septic office in the Montgomery County Department of Permitting Services.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Specific Conditions

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) *Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Only one accessory apartment is proposed.

- (2) *The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) *The lot is 2 acres or more in size; and*
- (ii) *The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

The accessory apartment will be located in the basement of the existing house and therefore shares at least one party wall with the main house.

- (3) *An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

No addition or extension is proposed.

(4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.

Mr. Payne stated that the house was built in 1972, 30 years ago.

(5) The accessory apartment must not be located on a lot:

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

None of these conditions exist. Mr. Martell pointed out in his inspection report that if the Paynes wish to live in the accessory apartment and rent out the main part of the house, under this Section of the Zoning Ordinance, they would be required to rent it to a family of related persons.

(6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

The accessory apartment has a separate entrance at the rear of the house, and will not be visible from the street, preserving the single-family residential appearance of the house.

(7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

No external improvements or modifications are proposed.

(8) The accessory apartment must have the same street address (house number) as the main dwelling.

The accessory apartment will have the same address as the main house.

(9) The accessory apartment must be subordinate to the main dwelling.

The accessory apartment measures 750 square feet, and is subordinate to the 2,567 square-foot main house.

(b) Ownership requirements:

- (1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

The owners of the property currently occupy the main dwelling, but propose to move into the accessory apartment and rent out the main part of the house.

- (2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

The applicants have owned the subject property for 29 years.

- (3) Under no circumstances is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

The owners will only receive compensation for one dwelling unit.

- (4) For purposes of this section, "owner" means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the board.*

The applicant owns the home, as evidenced by the deed submitted into the record as Exhibit No. 4.

- (5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Not applicable.

(c) Land use requirements:

- (1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached*

dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

The subject property is 43105 square feet in size, which meets the 40,000 square foot minimum lot size requirement in the RDT zone. This home and lot predate creation of the RDT zone.

- (2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).*

There are no other special exceptions in the vicinity.

- (3) There shall be adequate water supply and sewage disposal systems to serve the occupants of both the accessory apartment and the main dwelling.*

The Applicant states that the subject property is served by adequate public facilities. The Board will impose a condition of approval that the Applicant obtain certification of adequacy of the septic system from the Well and Septic office in the Montgomery County Department of Permitting Services.

- (4) Adequate parking shall be provided. There must be a minimum 2 off-street parking spaces, unless the Board makes either of the following findings:*

(i) More spaces are required to supplement on-street parking;
or

(ii) Adequate on-street parking permits fewer off-street spaces.

Off-street parking spaces may be in a driveway but otherwise shall not be located in the yard between the front of the house and the street right-of-way line.

The subject property has room for more than two off-street parking spaces.

- (5) Accessory apartments shall not be detrimental to the use and peaceful enjoyment of surrounding properties or the general*

neighborhood, and shall cause no objectionable noise, traffic or other adverse impacts.

The Board finds that the subject property is well set back and buffered from neighboring properties, that the availability of parking on site, and preservation of the single family residential appearance of the house serve to minimize its impact on surrounding properties. Therefore, the Board finds that the accessory apartment will not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood.

Therefore, based upon the foregoing, the Board finds that the special exception can be granted, subject to the following conditions:

1. Petitioner shall be bound by all of his testimony and exhibits of record to the extent that such representations are identified in the Board's opinion granting the special exception.
2. Petitioner must obtain written confirmation of adequacy from the Department of Permitting Services, Division of Land Development - Well and Septic.
3. A single cylinder (key operated from the outside, thumb turn on the inside) lock must be installed on the sliding glass door.

On a motion by Louise L. Mayer, seconded by Angelo M. Caputo, with Allison Ishihara Fultz and Donna L. Barron, Vice Chairman in agreement, and Donald H. Spence, Jr., Chairman necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

Donna L. Barron
Vice Chairman, Montgomery County Board of

Appeals

Entered in the Opinion Book
of the Board of Appeals for

Montgomery County, Maryland
this 28th day of June, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.